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In the Supreme Court of the United States

OCTOBER TERM, 1975

ARTHUR VENIOS and GARY WALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 521 F.2d 506.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1975. The petition for a writ of certiorari was filed on September 22, 1975. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to consider the government's appeal from the suppression order and the denial of reconsideration of that order, filed within 30 days of the refusal to reconsider.

2. Whether the district court abused its discretion in concluding that the affidavits submitted were inadequate to show that the electronic interceptions were properly authorized.

STATUTES INVOLVED

18 U.S.C. 2518(10)(b) provides:

> In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

18 U.S.C. 3731 provides in pertinent part:

* * * * *

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

STATEMENT

Petitioners and seven others were charged with gambling and related offenses in violation of 18 U.S.C. 1084 and 1952, and with conspiring to commit those offenses in violation of 18 U.S.C. 371 (A. 11-20).[1] The district court granted their pre-trial motions to suppress evidence gained by court-ordered electronic surveillance on the ground that the application for the order had not been authorized as required by 18 U.S.C. 2516(1).[2] Following the denial of a motion for reconsideration, the government ap-

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[1] "A." refers to the appendix on appeal, a certified copy of which has been filed with the Clerk of this Court.

[2] 18 U.S.C. 2516(1) provides that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application" to be made to a court for an order authorizing electronic surveillance.

pealed pursuant to 18 U.S.C. 2518(10)(b) and 3731 (*supra*, pp. 2-3). The court of appeals vacated the suppression order and remanded the case for further proceedings (Pet. App. A).

On July 20, 1970, an application was submitted by a special Justice Department attorney pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510-2520 (A. 28-31), to Judge Murray, in the United States District Court for the District of Massachusetts, for an order authorizing the interception of communications of Anthony M. St. Laurent and others unknown over two telephones. Both the application and the subsequent court order authorizing the electronic surveillance identified former Assistant Attorney General Will Wilson as the specially designated person who authorized the application (A. 26, 28). Pursuant to the court order, interception of communications over the two telephones commenced on July 22, and terminated on August 2, 1970. The indictment against petitioners and their co-conspirators was based principally upon the results of these interceptions.

Following various pre-trial proceedings in which petitioners challenged the authorization procedure followed in this case, the government filed affidavits of Sol Lindenbaum, the Executive Assistant to the Attorney General, and Henry E. Petersen, the Acting Assistant Attorney General in charge of the Criminal Division of the Department of Justice. These affidavits disclosed that the application for the court order authorizing the interception had not, in

fact, been authorized by Assistant Attorney General Wilson, but had been personally approved by Attorney General Mitchell (A. 61-63). Lindenbaum averred that on July 16, 1970, "the Attorney General approved a request for authority to apply for an interception order in this case," referring to Mitchell's "personally initialed memorandum * * * to Will Wilson * * * specially designating him to authorize [the special attorney] to apply for an interception order in this matter" (A. 61). A copy of the memorandum was attached to the Lindenbaum affidavit (A. 62). Petersen's affidavit indicated that he had affixed Will Wilson's name to the authorization letter pursuant to standard procedure within the Justice Department at that time (A. 63).

After a hearing, Judge Julian found the affidavits insufficient to establish that the interception had been personally approved by the former Attorney General, and ordered the government to file additional affidavits. The government in March 1972 filed additional affidavits of Lindenbaum and Petersen, as well as an affidavit of former Attorney General Mitchell. The Lindenbaum affidavit described in detail the procedures followed in the Justice Department, both generally and in the specific interceptions involved in this case (A. 121):

> Attorney General John N. Mitchell refrained from designating any Assistant Attorney General to authorize, without his approval, the making of an application for * * * [an electronic interception] * * *. Rather, Attorney General Mitch-

ell required that all requests for such authorization be referred to him for consideration. Since February 1969, I have, in the normal course of my duties, routinely reviewed such requests and made recommendations to the Attorney General thereon. In doing so, I became familiar with the applicable statutory requirements and the actions taken by Attorney General Mitchell on such requests. Also in the course of my duties, I became familiar with Mr. Mitchell's signature and signed initials.

The Lindenbaum affidavit concluded with Lindenbaum's averment that the initials on the attached memoranda approving the request for authorization to make the applications in question had been personally affixed by Mitchell (A. 122-128).[3]

[3] Although the Mitchell affidavit had been prepared for submission in another case, it was equally applicable to the instant case, since it set forth the general procedure followed in the Attorney General's office on all requests for authority to apply for an electronic interception. Mitchell stated that during the period in question, he had established a procedure requiring all requests for authorization to be submitted to his office for his personal approval, or the approval of Lindenbaum in the event he (Mitchell) was unavailable. Mitchell further stated (A. 132-133):

> If I determine to approve a request, I indicate my approval by initialling a memorandum addressed to the Assistant Attorney General in charge of the Criminal Division. This memorandum recites that the Assistant Attorney General is "specially designated" to authorize the application. * * * The memorandum constitutes a notification to the Assistant Attorney General of the Criminal Division that I have performed the discretionary act of approving the request.

Similarly, the affidavit of Henry Petersen set forth the standard procedure under which he routinely signed Will Wilson's signature to letters dispatched to attorneys in the field notifying them that an application had been authorized (A. 129-131).

After considering the new affidavits, the court denied motions to dismiss the indictment on the ground of improper authorization procedures. It specifically found that "Attorney General John N. Mitchell personally approved the disputed wiretap authorizations in this case in conformity with 18 U.S.C. § 2516(1)" (Pet. App. A 26; A. 5). The court thereafter granted a motion for reconsideration of its ruling, but stayed hearings on the matter pending this Court's decision in *United States* v. *Giordano*, 416 U.S. 505, which was then pending (Pet. App. A 26; A. 6).[4] Before such hearings were held, the case was transferred to the docket of Judge Skinner (A. 6).

Following a hearing before Judge Skinner, the court ruled that the burden was still on the government to establish that the application was properly authorized. When the government offered no further proof on that matter, the court granted the motions to suppress, stating (A. 146):

> Then I will allow the motion to suppress because I don't accept Mr. Lindenbaum as an ex-

[4] The court of appeals concluded that this action "does not show that [Judge Julian] was necessarily retreating from his factual finding that Mitchell had personally approved the authorizations. Rather the decision seems to have been made to await the Supreme Court's resolution of the controlling legal issues" (Pet. App. A 26-27).

pert on handwriting, nor do I think that mere office familiarity is enough. * * * There is nothing in the file to establish Mr. Lindenbaum as an expert in any respect in these matters and I am not going to accept his affidavit.

Now in other cases we have had a specific affidavit from Mr. Mitchell with respect to particular authorization. * * * [B]ut in this case the affidavit says only that after a date I think in 1971 he personally approved all of the orders, and these orders were made prior to that time.

The court concluded:

> I will enter the order today allowing all of the motions to suppress in these two cases on the ground that I am not satisfied that the government has carried the burden of proving by clear evidence that there was a proper authorization by any of the officials specified in the statute.
>
> * * * * *
>
> My decision is not an issue of a question of law, it is a factual decision. I am not satisfied on the evidence as a matter of fact. * * * [A. 149.] [5]

The government filed a motion for reconsideration, with an affidavit of the former Attorney General executed on January 15, 1975 (A. 151-153). In that

[5] The following day, December 19, 1974, Judge Skinner endorsed the transcript of the hearing as constituting his findings and rulings on the suppression motions (A. 150), and the docket entries reflect that such transcript was filed on December 20, 1974 (A. 7).

affidavit, Mitchell stated that he had examined the originals of all the memoranda in question and that they bore his initials, indicating his personal approval for the interception applications (A. 153). The court denied the motion, stating (A. 152):

> I do not accept Mr. Mitchell's affidavit made so long after the event and in Mr. Mitchell's present circumstances. It is too little and too late.

On the government's appeal from the suppression order and the denial of the motion for reconsideration, the court of appeals vacated the order granting the motion to suppress, and remanded to permit the government to submit further evidence concerning the authorization (Pet. App. A 28-30).

ARGUMENT

1. Petitioners assert that the court below lacked jurisdiction to hear the government's appeal in this case, because the government had no right to appeal from the district court's denial of reconsideration, and because the notice of appeal was untimely if considered to refer to the initial suppression order.

a. Petitioners' first contention is that a motion for reconsideration is "not one of the orders expressly enumerated in the statute [18 U.S.C. 2518(10)(b)] as appealable," and thus that no appeal lies from the denial of such a motion (Pet. 8). However, the government's appeal in this case was not simply a challenge to the district court's denial of reconsideration, but rather was an appeal of the suppression order (A. 154).

For that reason, petitioners' reliance on *United States* v. *Greely*, 413 F.2d 1103 (C.A.D.C.), is misplaced. In that case, the district court entered an order of suppression from which the government took a timely appeal. Five months later, while the original appeal was pending, the government filed a motion in the district court to reopen the hearings to consider newly discovered evidence. The motion was denied and the government took a separate appeal from that order. The court of appeals held that the latter appeal did not involve "the difficult and unsettled area of suppression rulings," and that "neither the language nor the primary purpose of * * * [18 U.S.C. 3731]" authorized such an appeal (413 F.2d at 1104, 1105). The government's appeal in this case, however, challenged the district court's suppression order, and is proper under 18 U.S.C. 3731 and 2518(10)(b). See, *e.g.*, *United States* v. *Roberts*, 477 F.2d 57, 58 (C.A. 7), certiorari denied, 417 U.S. 908.

b. Petitioners also assert that the challenge to the original suppression motion is untimely. They argue that the filing of the motion for reconsideration prior to the expiration of the time in which to file an appeal did not extend the statutory period to appeal from the original motion (Pet. 11).[6] *United States* v. *Healy*, 376 U.S. 75, refutes this contention. In *Healy*, the Court held that a petition for rehearing

[6] Petitioners do not challenge the lower court's determination that the motion for reconsideration was timely filed (Pet. App. A 30-32).

in a criminal case filed within the permissible time for appeal rendered the judgment not final for purposes of appeal until the district court disposed of the petition, and a government appeal filed within 30 days of the denial of the petition was timely.

Petitioners attempt to distinguish *Healy* on the ground that here the motion for reconsideration presented new facts rather than challenging a legal determination of the district court, and they also allege that here the government "is guilty of bad faith in petitioning for rehearing" (Pet. 15). But it is irrelevant whether a motion for reconsideration presents a question of fact or a question of law (Pet. App. A 32); the critical consideration is that until the motion is decided, the district court's order is not final. The Court's observations in *Healy* concerning the advantages of correcting legal errors in the district court, as opposed to correcting them through the appellate process (376 U.S. at 80), are equally applicable to questions turning on issues of fact. Since the ground on which Judge Skinner granted petitioners' motions to suppress was that the government had failed to file a particularized affidavit of John Mitchell (A. 148-149), it was reasonable to assume that the district court would reconsider its order when presented with such an affidavit, and an appeal would be unnecessary.

Nor is there merit in petitioners' allegation that the motion for reconsideration was an improper attempt by the government to rectify its delay in filing an affidavit of Mitchell which it knew should have

been filed previously (Pet. 18-19). As the court of appeals noted, affidavits substantially identical to those filed in the district court in March 1972 had been found to be sufficient proof of Mitchell's personal authorization of electronic interception applications by several courts;[7] the government did not act "unreasonably in relying on the affidavits then available" (Pet. App. A 28). This reliance was particularly warranted after Judge Julian's finding that those affidavits established Mitchell's personal authorization.

2. Petitioners argue that the district court did not abuse its discretion in granting their motions to suppress and refusing to reconsider its action in light of the new affidavit by Mitchell. But, as noted, affidavits like those before the court when it granted the motion to suppress have consistently been held sufficient to establish Mitchell's personal authorization of the application for the intercept order.[8] Thus, the court's action in granting suppression was at best dubious. Even assuming *arguendo* that the original order granting suppression did not exceed the court's

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[7] *United States* v. *James*, 494 F.2d 1007 (C.A.D.C.), certiorari denied, *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Fiorella*, 468 F.2d 688 (C.A. 2), certiorari denied, 417 U.S. 917; *United States* v. *Ceraso*, 467 F.2d 647 (C.A. 3); *United States* v. *Martinez*, 498 F.2d 464 (C.A. 6), certiorari denied, 419 U.S. 1056; *United States* v. *Quintana*, 508 F.2d 867 (C.A. 7); *United States* v. *Brick*, 502 F.2d 219 (C.A. 8); *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), certiorari denied, 417 U.S. 918.

[8] See cases cited note 7, *supra*. We are aware of no other case in which suppression has been granted simply because of the lack of a Mitchell affidavit addressed to the particular authorization at issue.

discretion, however, its refusal to reconsider its order when the requested affidavit was produced was improper. As the court of appeals noted (Pet. App. A 29-30):

> Normally, of course, district courts have wide latitude to refuse reconsideration. But this was a unique situation where those immediately responsible for the Government's case cannot be said to have been derelict in their preparation. Another judge had earlier accepted the affidavits as probative of Mitchell's authority. His action was not binding, but it at least justified the Government in believing that it had met the threshold requirements for "clear" evidence. If more was desired, it was entitled to be told and to have a reasonable opportunity to produce it.
>
> * * * * *
>
> But here the affidavits were not only rejected out of hand, but the Government was given no opportunity to establish its position by producing further support that Mitchell authorized the wiretaps, because in advance of the court's ruling it had no reason to expect that more than what it presented was necessary. If courts could peremptorily reject normally adequate affidavits in this area, the Government would face an intolerable burden in having to surmise the degree of verification required for each case and each judge. Of course, the Government would not be entitled to a second chance if it were to delay or not produce initially what would ordinarily be known to be necessary. But this does not appear.

In sum, we submit that the government has amply proved that the application herein was properly authorized,[9] and that the district court's summary rejection of the affidavits proffered, in the absence of any evidence to refute their validity, was arbitrary. Accordingly, the court of appeals properly remanded the case for further consideration in the light of all the evidence (Pet. App. A 30).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1975.

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[9] The affidavits offered herein are substantially identical to those which were before this Court in *United States* v. *Chavez*, 416 U.S. 562. See also *United States* v. *Doolittle*, 507 F.2d 1368, 1371 (C.A. 5), affirmed *en banc*, 518 F.2d 500, pending on petitions for a writ of certiorari, Nos. 75-500, 75-509, 75-513; *United States* v. *Ramsey*, 503 F.2d 524, 526, n. 4 (C.A. 7), certiorari denied, 420 U.S. 932; *United States* v. *Thomas*, 508 F.2d 1200, 1202-1203 (C.A. 8), certiorari denied *sub nom. Schullo* v. *United States*, 421 U.S. 947; *United States* v. *John*, 508 F.2d 1134, 1137-1138 (C.A. 8), certiorari denied *sub nom. Bernstein* v. *United States*, 421 U.S. 962; *In re Alperen*, 355 F. Supp. 372, 374 (D. Mass.), affirmed *sub nom. United States* v. *Doe*, 478 F.2d 194 (C.A. 1).

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